NexTrust Deliverable 6.2 - Report on the legal aspects of the initial phase of matchmaking and the pre-contractual phase

Deliverable 6.2

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Executive Summary

The main objective of the NexTrust research project is to increase efficiency and sustainability in European logistics by designing interconnected, trusted networks that collaborate together along the entire supply chain. With this, NexTrust is following a straightforward but effective 3-Step trusted network research methodology (hereinafter "3-Step Methodology") [Figure 1: NexTrust 3-Step Methodology].

[Figure 1: 3-Step Methodology]

This methodology looks at horizontal collaboration as a structured and controllable process. In summary, this process is broken down into three chronological steps, which in some cases can overlap, but is the logical collaboration process to follow.

1) Identification
2) Preparation
3) Operation

The herein presented Deliverable 6.2 focuses on the legal aspects of the first two stages of the 3-Step Methodology: identification and preparation. General contract, competition law and IT/IP-law aspects have been analysed. It is a natural consequence that IT/IP-law plays an important role in the identification and preparation stages of logistics collaboration projects. After all, IT makes it possible to collect, analyse and compare the logistics data of different market players and has therefore cleared the way for innovation and collaboration.

The *identification* phase is the stage of data collection and matchmaking. It precedes the (pre-contractual) phase in which a match is identified and the business case is developed. Collaboration in the supply chain comes with the setting up of a matchmaking service. Therefore individual shippers provide supply chain data to trustee companies that run a data platform in view of the comparison of this data with the data of other shippers which do the same in order to find bundling opportunities. In this stage a variety of legal issues comes up, such as confidentiality, data security, data ownership, prevention of misuse and the competition law risk of (in)direct information exchange. The identification phase is an individual stage; shippers interact with the trustee on a one-to-one basis.

The *preparation* phase is the succeeding, collective pre-contractual stage which covers the period after a match is identified to the moment (operational) contracts have been entered into between the shippers and logistics service providers. In this stage the trustee has introduced the shippers involved and they will work out their business case together under the management of the trustee

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who does not only give direction to the business case development process but who can also assure that the shippers involved in the proposed collaboration, can avoid the exchange of commercial sensitive information. There is no need for that as the trustee can and will act as black box. Relevant legal issues are again confidentiality of data, competition law risks, the break-off of negotiations, mutual liability and the tender process to select a logistics service provider. In this Deliverable a detailed analysis has made of the legal issues that come up for discussion in the preparation stage as well.

Successful collaboration is not a matter of luck. It is the result of a structured process from the very beginning. Therefore, the central proverb of this Deliverable is: "*A good beginning is half the battle".* Apart from that, it is obvious that 'trust' between the players involved is essential to success. The trustee plays an important role to support the trust between the parties and so does proper legal process management. A key lesson is pay attention to the legal issues that need to be addressed in the first two stages in time. That way, the participants manage their expectations; they have a clear process and arrangements in place the regulate the preliminary stages in which the anticipate their collaboration project. In a sense, some basic principles and rules can avoid discussions that could easily hinder progress and even risk the end result. In these preliminary stages, the participants have not yet a cooperation contract in place, however by continue working towards the operational stage, the participants need arrangements regulating the identification and preparation, such as NDA and other mutual agreements. The Trustee could have under market conditions a "contractual" agreement with the participants by offering its matchmaking service. However, as the trustee role is new in the supply chain market and this role is funded by the EU project, the current set up of NexTrust pilot cases do not have a contractual agreement in place.

This Deliverable will later on be supplemented by the following other legal deliverables:

- D6.1: "Consolidated legal report on the NexTrust pilot cases" (due by month 36);
- D6.3: "Competition law aspects of horizontal and vertical collaboration and blueprint for the competition law training" (due by month 34);
- D6.4: "Legal definition of the 'trustee' concept and on the legal forms (due by month 28);
- D6.5: "The effect of the absence of an international convention on multimodal transport" (due by month 34);
- D6.6: "Interaction between the key players in the logistics chain" (due by month 24);
- D6.7: "The legal framework for collaboration in logistics in e-commerce and CITS-ICT" (due by month 36).

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Introduction D6.2

1. Introduction

This deliverable is the report for D6.2, legal aspects of the initial phase of matchmaking and the pre-contractual phase, due month 18 (October 2016). The 3-Step Methodology was first designed and tested on small scale in the market by the NexTrust partners TRI-Vizor, Giventis, Kneppelhout and Pastu in the EU FP7 funded *CO3 Project* (Period 2011-2014, www.co3-project.eu). This methodology is now applied with the NexTrust pilot cases on larger scale and much wider scope along different categories of the supply chain. In this report the legal aspects of the first two phases will be discussed in more detail.

2. NexTrust project overview

The NexTrust project has been granted funding from the EU Horizon 2020 Research and Innovation Programme under Grant Agreement 635874. In broad outline, the NexTrust Project specifically aims to increase efficiency and sustainability in the logistics chain by developing trusted collaborative networks that enable horizontal and vertical collaboration across shippers and industry sectors with all their respective supply chains, including last mile (e-commerce), in the European logistics market. These networks will fully integrate shippers, logistics service providers ("LSP's" or "LSP") and intermodal operators as equal partners. To reach a high level of sustainability, these networks will not only bundle freight volumes, but shift them off the road to intermodal rail and waterways. These networks will significantly reduce greenhouse gas emissions and traffic congestion, while simultaneously improving asset utilization and logistics cost efficiencies, thus creating a more sustainable, competitive arena for European logistics that will be an inspirational example for the market. The NexTrust Project original plan is to cover 23 pilot cases in five different categories. The action engages major shippers as partners owning freight volumes of well over 1,000,000 annual truck movements across Europe, plus SME shippers and LSP's with a track record in ICT innovation. Characteristic of the NexTrust project is the focus on market driven research and innovation. NexTrust intends to create 'stickiness' for collaboration in the marketplace, validated through large-scale pilot cases carried out in real market conditions. The underlying foundation of the NexTrust consortium is the belief that horizontal and vertical collaboration should not be viewed only in the context of a theoretical or technological exercise, but when applied and validated pragmatically, can lead to a new level of business maturity and innovation strategy.

The pilot cases cover the entire scope of the call and cover a broad cross section of entire supply chain (from raw material to end consumers) for multiple industries. The creation and validation of trusted collaborative networks will be market oriented and implemented at an accelerated rate for high impact. We expect our pilot cases to reduce deliveries by 20%-40% and with modal shift to reduce GHG emissions by 40%-70%. Load factors will increase by 50%-60% given our emphasis on back-load/modal shift initiatives. NexTrust will achieve a high impact with improved asset utilization and logistics cost efficiency, creating a sustainable, competitive arena for European logistics that will be an inspirational example for the market.

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3. Purpose and Scope of Deliverable 6.2 - legal aspects of the initial phase of matchmaking and the pre-contractual phase

As said before, NexTrust is following a straightforward but effective 3-Step Methodology. This methodology looks at horizontal collaboration as a structured and controllable process. The first research step is the identification of opportunities, followed by preparation, implementing potential matches into pilot scenarios, and then the operation phase, where we validate the trusted network pilot scenarios in real market environments. The purpose of the herein presented deliverable (6.2) is to describe the legal aspects of first two stages of the 3-Step Methodology: identification and preparation. In the first two phases a complexity of legal issues comes up, such as confidentiality, data security, data ownership, prevention of misuse and the competition law risk of (in)direct information exchange, investments, break-off of negotiations, mutual liability and LSP selection.

The report gives an overview of the legal aspects that need to be taken into account when parties in the supply chain want to start to collaborate. What are the legal snares and pitfalls in the very beginning of a horizontal collaboration and how can parties overcome these difficulties? Legal difficulties should be considered as challenges and should not be a reason for the parties to ignore the legal issues. In fact, it stresses the importance of making clear arrangements and subsequently laying those arrangements down in writing. That starts already in the identification and preparation stages.

[Figure 1: 3-Step Methodology]

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Legal aspects of the initial phase of matchmaking and the pre-contractual phase

1. Introduction

1.1 “A good beginning is half the battle”

In order to gain a good understanding of the legal process, it is useful to analyse the different steps that need to be completed upfront. Please be aware that legal plays a role in each potential collaboration as from the beginning. For instance, ownership of intellectual property starts as of the development of such and awareness on confidentiality of information is required at all times. Making clear arrangements with respect to the initial and pre-contractual phase of research and negotiations reduces the risk of raising false expectations. Therefore it is advisable that the participants of a proposed horizontal and/or vertical collaboration project give structure to the preliminary stages, by making some basic arrangements and preferably to lay those down in writing. After all: “*A good beginning is half the battle.”*

1.2 Data collection, analysis and identification of matches

Comparable to a ‘dating service’ that brings two people together on a date who seem to match on the basis of their profiles, a logistics collaboration project starts with data collection, analysis and matchmaking activities. In the preliminary phase specific collaboration partners are not yet in the picture. In this stage the individual shippers interact on a one-to-one basis with the trustee only. A shipper who considers to ask a matchmaking service company (trustee) to chart his bundle potential and for that purpose to compare his supply chain data to the data of other shippers who have done or are about to do the same, should make arrangements with this trustee with respect to confidentiality and data ownership. A NDA with some data rules, is sufficient in the context of a project as NexTrust. The trustee provides already a service in this stage to the individual shipper. He collects, processes, analyses and compares the data. In real market conditions he will probably request the shipper to conclude a simple service provision contract, in which the instructions and his tasks are formulated and which also can include that the trustee is entitled to some compensation. Additionally, such simple service contract would also include a confidentiality clause and data rules.

In this initial phase of matchmaking, the trustee has an active role in finding possibilities to bundle freight flows. The selection of partners can be done before or after trade lane selection. The outlines of a business case are drawn.

1.3 Preparation

Once the trustee has identified a possibility to combine trade lanes of different individual shippers, he has to bring these parties together and make a proposition. The collective preparation phase normally starts with a joint meeting during which the trustee presents the potential business case based on high level historic aggregated data. Parties can give structure to the preparation phase by laying down the arrangements with respect in writing, for example in a NDA. Consideration can

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for example be given to aspects as the bearing of research and other initial costs, competition law aspects, confidentiality, what happens if the negotiations break off, and when will parties be deemed to have concluded a contract. It is also important to realize that although this seems inherently contradictory, negotiations about a collaboration contract itself can sometimes develop in such a way that it becomes the main obstacle for the actual realization of the proposed collaboration. Particularly within large companies, there normally is a distinction between the commercial and legal departments and these business units do not necessarily speak the same language. The commercial arm of the company will normally make the initial contact with other companies and commence research activities. If this research shows that there are good possibilities to combine distribution and logistics on certain trade lanes and that considerable efficiency gains, costs savings and other benefits can be achieved with that, the commercial people will become enthusiastic and might even be convinced. But then parties realize that they will (still) have to lay down the proposed collaboration in writing. In-house lawyers or external legal advisors will then be called in. Those people have a different perspective and might start to express concerns and objections against the potential collaboration. The communication about such reservations that subsequently takes place between the proposed collaboration partners can easily have a negative effect on their relationship. To sum up a few potential reservations legal people might bring up for discussion:

- conservativism on model (commercial) contracts and standard clauses used by the company;
- the applicability of general terms and conditions;
- competition law;
- confidentiality;
- intellectual property rights.

In general it is advisable to coordinate ‘commercial’ and ‘legal’ processes and involve or at least inform legal experts in an early stage. Competition law aspects, for example, come already into play in the initial phase, in which the trustee collects and analyses (often sensitive) data of the shippers. After all, there is a multiplicity of legal aspects which needs to be arranged in the eventual collaboration contract. When parties do not discuss potential legal hurdles in time, those might nip the initial enthusiasm and trust, which are so essential for success, in the bud.

After the preparation phase, in which the NexTrust team also advises proposed participants to have their collaboration evaluated by a competition law and IT-law expert on the concrete merits of the case and take care of the fact that the responsible case managers receive a competition law training, parties sign the agreement(s) and start to work in the operational stage.

1.4 It begins and ends with trust

In the first two phases of a potential collaboration, potential participants lay the foundation for a (hopefully long-term) business relationship which has to be based on mutual trust. Trust is of utmost importance for the success of a logistics collaboration project. Especially in the more complex forms of collaboration, often (substantial) investments will have to be made to analyse whether there are possibilities to bundle freight flows and if so, to subsequently synchronize these

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flows. It is obvious that parties, which make clear arrangements with respect to the preliminary stage of research and negotiation, reduce the chance of raising false expectations. Needless to say that it is hard to catch trust between parties in arrangements. However, if parties trust each other and want to keep this trust alive in the long run, clear arrangements play an important role. In fact the presumption is that in the long run, a solid legal framework laid down in written contracts, is essential to keep the trust alive.

To reduce the risk that a low level of trust may bring to the collaboration, the role of a neutral trustee has been introduced. This trustee coordinates the process, controls and safeguards the sharing of data in the (beginning of a possible) collaboration and takes care of the division of synergies generated from collaboration activities. In commercial market conditions the shippers will also need to discuss the compensation of the trustee's efforts. Efforts by the trustee may need to be compensated and there are several alternatives for this. The shippers can be charged a fixed service fee, or share a fixed percentage of surplus value or cost savings achieved depending on the value that the trustee achieves. The trustee can also be compensated based on the degree to which he contributes to the synergy creation in the logistics collaboration. This way, the trustee is guaranteed to cover some fixed expenses in coordinating the collaboration in the first phase already, before the operation of the collaboration actually has started, while also being provided with incentives to pay more effort to the group level synergy creation. It is advisable to have a general framework to design compensation rules for horizontal collaboration in a logistics setting. The first issue is to clearly define what needs to be compensated and this should be made absolutely clear to all participants. This way it could be avoided that the trustee leaves the preliminary stages empty-handed, while he in fact was the party who brought the collaboration partners together.

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2. Phase 1 and phase 2 - from identification to preparation

2.1 Milestone plan

In the identification and preparation phase the collaboration can face legal spectacles as illustrated here below. The milestone plan is a kind of task and check list to understand what aspects could be tackled and are needed to build up a successful trusted collaboration. It depends on each business case, what aspects must be addressed in what stage.

[Figure 2: Milestone plan]

- confidentiality (NDA)
- rules with respect to data, data security, data ownership
- competition law aspects (information exchange)
- data matching
- feed back
- selection trade lanes
- selection partners
- is there trust?

- working out developing business case
- negotiations
- coordination commercial and legal processes
- selecting LSP's
- making choices for contractual basic principles →

Collaboration contract shippers

• form collaboration, no partnership clause
• object collaboration
• gain sharing-mechanism
• rules with respect to volume variation
• entry/exit clauses
• competition law
• liability regime
• choice of law
• jurisdiction

Contract service provision shippers – trustee

• list of tasks / activities, working method
• qualification contract
• confidentiality clause
• data rules, data ownership, privacy issues
• trustee compensation
• freight forwarding discussion/ position trustee towards LSP's
• liability regime
• choice of law clause
• jurisdiction

Skeleton carriage contract shippers - LSP

• acknowledgement special character collaboration shippers
• position trustee
• service levels

- contract drafting
- customizing legal agreements
- competition law advice
- training session 'alarm bells' competition law

We advise participants of a potential collaboration to involve their legal departments in an early stage of a pilot case (and in any case before becoming operative) in order to make sure that legal issues are sufficiently and timely addressed.

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The Milestone plan and the different aspects within the first two phases will be discussed in section 3. First we need to clarify some legal uncertainties. One of the key questions would be the legal definition of the preliminary phases and, more important, the legal relationship between the shippers and between the shippers and the trustee during these stages. How can we define this in legal terms? Do the parties have actionable obligations in law towards each other or is it a noncommittal relationship with no legal consequence(s) whatsoever? Does the term "pre-contractual" alter in "contractual" the moment parties enter into a NDA? Among other things, these topics will be addressed.

2.2 Legal definitions preliminary stages 1 and 2

In the Netherlands as well as in many other EU countries, the freedom of contract is one of the axioms of contract law. In former days, an agreement was based on a very classic yet simple model: an agreement is reached at the moment that an offer is accepted.

However, times are changing. The classic procedure for entering into agreements does not meet the requirements posed by the market today anymore. The modern contract making process is often a set of very complex agreements and often involves considerable amounts of money. Negotiations may last for months or even years. As a result, the parties will reach an agreement by piecemeal. There is not always a simple offer and acceptance anymore , but there are explorations, negotiations, offers, counteroffers, partial agreements, meetings et cetera, and the ultimate agreement(s) is/are reached only at the end of the discussion. One of the learnings of NexTrust so far is that this is definitely the case in the setting of collaborative logistics. But when exactly is the discussion ended? For this still developing contract formation procedure, also known as the pre-contractual phase, in most legal systems no special and adequate rules have been established. This also counts for the Netherlands. The DCC of 1992 does not contain a provision on the pre-contractual phase.

Under Dutch and German law (as well as under many other EU law systems) it is an established principle that, in the pre-contractual stages of a final agreement, parties are obliged to take account of each other's justifiable interests. Therefore, the negotiation process during the first two stages is actually of an obligatory nature. As stated above, clear arrangements with respect to the preliminary stages contribute to the proper managing of expectations and the legal and commercial processes in general.

Preliminary agreements are often used as a starting position to provide a framework for the parties to negotiate a final contract or to record an agreement on key commercial terms in order to reduce deal-risk before the parties incur any further expenses. Preliminary agreements are generally expressed as being legally binding, non-binding or a mix of the two - where the parties intend certain ancillary provisions such as confidentiality, exclusivity and costs to be binding, but not the commercial terms of the transaction.

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2.2.1 Relationship between shippers-trustee

The arrangements between the trustee and the shippers individually in the initial phase and in the pre-contractual phase can be described as legally binding, as each shipper individually enters into a so called contract for services ("*Overeenkomst van Opdracht*") with the trustee or more trustees. Under Dutch law a contract for services is a contract whereby one party, the provider of services (here: the trustee), binds himself towards the other, the client (here: the shipper), to perform, otherwise than on the basis of a contract of employment, work consisting of something other than the creation of a work of a tangible nature, the safekeeping of things, the publication of work, or the carriage or transportation of persons or things (according to Section 1, Title 7 of Book 7 DCC (articles 7:400 and further)).

The trustee carries out different logistics and legal activities in favour of the shippers. Some of these activities have a factual nature, others qualify as legal acts. The contractual relationship between the shippers and the trustee qualifies as an agreement for professional services and partially might qualify as a mandate agreement (according to section 2, Title 7 of Book 7 DCC (articles 7:414 and further)). Please be aware of the fact that in case the trustee would negotiate about the conclusion of or conclude concrete carriage contracts on behalf of the individual shippers with LSP's, insofar the agreement could additionally also qualify as a freight forwarding contract in the meaning of Section 3 of Title 2 of Book 8 DCC (articles 8:60 and further). It depends on the definition of a forwarding contract in the national law that applies to the contract.

2.2.2 (Non-)Relationship between shippers

The shippers do not have an actual relationship in the early phases. Participation in NexTrust pilot cases is always voluntarily. The agreements made in the initial phase and also in the preparation phase, however, can be described as a mix between legally binding and non-binding. Rules with respect to data, confidentiality and competition law are legally binding. If one party breaks the said rules, it can have serious consequences (some agreements made in this initial/pre-contractual phase can even have a penalty clause). Obviously in this stage the shippers don't have a final agreement for the combination of freight flows, neither a promise thereto. The shippers are therefore not bound to the obligation to bundle freight flows as will be the case after signing the final agreements (operation phase).

It is common practice of negotiations in the pre-contractual phase in general that parties will continue the negotiation as long as they have sufficient resources and they believe that the intended result, the final agreement, will probably be achieved on the terms they consider favourable and within a foreseeable timeframe. However, the notion of freedom of contract may not serve as a free ticket for the negotiating parties to act as they please. We will zoom into that hereinafter.

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2.3 Pre-contractual liability issues (under Dutch law) and the importance of written agreements

As said before participation in NexTrust pilot cases is always voluntarily. Failure of a party in good faith to (continue to) participate in a NexTrust pilot case shall normally not be used to claim damages from a company. However, in collaboration projects in general (outside a subsidized project context) it could be relevant to be aware of the risk of pre-contractual liability issues.[1]

Therefore it is worth to mention that under Dutch law, the relationship between parties in negotiations is governed by the principles of good faith, reasonableness and fairness. This may mean in certain circumstances that (i) a party may either be liable for damages if no agreement is entered into, or (ii) that the parties shall continue the negotiations, or even (iii) that an agreement is deemed to have been entered into, even if no agreement has been signed. This type of dispute heavily depends on the relevant facts, and the reasonable intentions and expectations that the parties may have on the basis of these facts. The Dutch Civil Code ("DCC") has no provision on pre-contractual liability.[2] The development of this doctrine was left over to the courts.[3]

The Dutch Supreme Court (Hoge Raad = HR) held in a case in 1957[4] that parties in negotiations take part in a 'legal relation ruled by the principle of good faith'. The consequence of this view is that parties have to take into account the 'justified interests of the other party.' As a result the court came to the formulation of a 'duty of care'; in this case the duty for the buyer to investigate the facts of the subject of contract. Just a few years later the court formulated a similar duty for the seller to disclose material facts to the buyer in the course of negotiations (*Booy – Wisman*, HR 21 jan. 1966, *NJ* 1966, 183). In these cases the contracts were actually formed and this principle of good faith in the pre-contractual stage was formulated in the context of the doctrine of misrepresentation.

These developments in case law were the beginning of reconsidering the law in a second situation where no contract was concluded at all between the parties, especially in cases of breaking off the negotiations. The first and still leading case in this field (in the Netherlands) is *Plas – Valburg*[5]. Construction firm Plas tendered for the building of a municipal swimming pool in the town of Valburg. The mayor and his aldermen agreed to the plans, but their decision still had to get approval from the City Council. A member of the Council took the initiative for an alternative tender and this resulted in a lower price. As a result, Plas was set aside and he claimed for damages. In this landmark decision the court made a distinction between three stages in the negotiating process:

1. the initial stage: parties are free to break off negotiations without any obligation to compensate the other party;
2. the continuing stage: a party may be free to break off negotiations, but at this stage he is under the obligation to compensate the other party for expenses incurred;

[1] Van Beukering-Rosmuller 2004, Wessels 2003, Van Dunné 1991.
[2] Although a provision was formulated, the legislator refused to incorporate it into the DCC.
[3] R.J.P. Kottenhagen, "*From freedom of contract to forcing parties to agreement",* Rotterdam Institute of Private law Accepted Paper Series, p. 1-17.
[4] HR 15 nov. 1957, *NJ* 1958, 67 (*Baris – Riezenkamp*).
[5] HR 18 June 1982, NJ 1983, 723.

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3. the final stage: a party is not allowed to break off the negotiations because this would be against good faith; violation of this obligation not only gives rise to compensate the negative interests of the other party, but also – if deemed appropriate – the positive interests, in other words the profits that the other party would have.

A next step was made by the Supreme Court in 1983: when a party is unwilling to continue negotiations, there may nevertheless be a legal obligation to do so and the unwilling party may be forced by the court to negotiate.[6]

The result of this development of the case law is that the freedom to break off negotiations may be barred on the ground of the justified reliance on the side of the other party that a contract will be concluded or in consideration of other circumstances of the case. Generally, parties are free to break off negotiations unless they have led the counterparty to have justified expectations. If such expectations exist, ending the negotiations may be regarded as frustrating the reasonable expectations of the other party/parties that an agreement would be reached. This is considered a breach of good faith principles.[7]

How to avoid the said risk of pre-contractual liability? Here the importance of written agreements emerges. The parties are free to specifically agree on the negotiations process to be followed and the stage at which binding obligations will arise, so that the aforementioned phases and accompanying rights and obligations do not apply. Typically, this would be agreed upon in writing through an NDA or Letter of Intent (hereinafter "LOI") or similar document before negotiations commence in earnest. Such document may state that no binding obligations will arise until, for example, an agreement in writing is executed or certain specific conditions have been met. It should be noted that these arrangements on the transaction process are subject to the requirements of reasonableness and fairness, and the fair expectations of the other party/parties. Breach of these arrangements (for example the breach of confidentiality clauses) may again lead to liability for damages.

2.4 Steps in phase 1 - Identification

The first logical step in creating, or better - exploring - horizontal collaboration is to detect and identify synergy opportunities in the supply chain. This critical step requires visibility of as many transport flows as possible, in order to single out the most interesting LTL/FTL combinations, co-loads, roundtrips or FTL synchronization "matches". Hence in this first phase, the trustee collects and analyses structural freight flow data of shippers who have expressed the interest to identify collaboration synergies between them.

In this phase, the added value of IT will come from automated freight flow data visualization, "Big Data" analytical capability and matchmaking. In transport and logistics jargon a structural freight

[6] HR 11 March 1983, NJ 1983, 585. See also Du Mee – Vestdijk and others, Court of Appeal of Amsterdam, 7 May 1987, NJ 1988, 635).
[7] R.J.P. Kottenhagen, "*From freedom of contract to forcing parties to agreement*", Rotterdam Institute of Private law Accepted Paper Series, p. 1-17.

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flow between two geographical points is called a “trade lane” or “lane”. In concrete terms, a trade lane can be described by simple characteristics such as:

- Lane origin and destination (postal code, city and country);
- Total aggregated annual volume and movements;
- Flow type (how volume is measured, e.g. in FTL, gross/nett weight, pallets or TEU);
- Average delivery frequency (daily, weekly, monthly);
- Equipment type;
- Product type and conditioning (e.g. CPG; ambient, frozen, dangerous);
- Asset type needed to transport the goods (e.g. standard truck, reefer container, road train).

Please note that no information will be requested on an individual product or specific product group level. As there is no need to know which products are included in the volumes, data in respect of products will not be collected. The same goes for data in respect of customers.

2.4.1 Data analysis

During this initial phase, the trustee has an active role in collecting and analysing the data of the shippers. Actually he is the most active player as he collects, analyses and matches data. After a potential collaborative match has been identified, the trustee will draw up the outlines of a business case in close consultation with each shipper (which trade lanes and which partners are interesting to compare). The trustee will communicate in writing or electronically to the participants individual the mere existence of a potential match for collaboration. Participants can then decide to opt out of any and all collaboration opportunities with specific partners simply by indicating to the trustee(s) that they are not willing to further explore possible collaboration with any of the other companies.

If the participants agree to pursue a collaboration opportunity, the trustee will provide the individual participants with the lanes that are in scope for a potential collaboration opportunity. The participants must then advise the trustee(s) as to which of these lanes - if any - they are interested in exploring the collaboration opportunities.

If participants mutually agree to investigate specific opportunities further, the ‘high level transport data’ on the specific matches that remain in scope will be communicated by the trustee(s) to the applicable participants. This includes the provision of lane origin/destination, aggregated quantity of movements, service and handling requirements, forecasts, equipment et cetera.

Once information is exchanged, the participants, by mutual consent, may elect to proceed with the development of a business case for one or more of the match scenarios presented. That is where phase 2, the preparation, starts.

2.4.2 Parties involved

In the first phase the following parties are involved with different tasks:

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1) **Trustee(s)**: the trustee will help the participants of a collaboration to identify, set up, organize and manage the pilot cases by first collecting individually from the proposed participants some (preselected) 'high level transport data' for the express purpose of matching this data with the similar data of (one or more) potential other collaboration candidates and identifying if there are any potential 'collaborative matches' for freight flow bundling on identical or compatible lanes. Again, the aim is to develop more sustainable and/or multimodal solutions. It is as if an impartial observer would take a helicopter view to look for bundling chances across the millions of structural freight flows and transport asset movements that exist everywhere in the European transport market.

   It is important that this process of collecting and matching is managed in complete confidentiality – supported by an agreement between partners – and that any information is shared only and exclusively through the trustee. The precondition is the design upfront (so before the trustee starts to work) of an anti-trust compliant legal framework that defines how to handle the collected data between the shippers.

2) **Shippers, individually**: each shipper has certain arrangements with the trustee in this initial phase of data collecting and matching.

2.5 Steps in phase 2 – Preparation

After the neutral trustee has identified one or more shippers who are open for collaboration, has mapped their structural freight flows and has identified matches, the trustee can invite the shippers around the table to propose logistics collaboration and to set up a common project team and roadmap. The 'collective' stage starts here. The shippers who up to now only interacted with the trustee on a one-to-one basis, are now introduced and will start to work out their collaboration project under the direction of the trustee who does not only manage the process but also functions as a black box to avoid the exchange of commercial sensitive information. Therefore, at the beginning of the preparation stage, the shippers and trustee need to agree on some basic rules in respect of confidentiality, data and competition law as well. The partners express their ambition to set up a collaboration project and outline a high level scope. The participants will each separately (and again on strict confidential basis) provide to the trustee(s) their respective current costs for lanes that are in the scope for the matches and any required terms and conditions. The potential benefits and expected barriers of transport bundling are documented. Cost data will be used by the trustee to calculate the current baseline to measure potential benefits.

The trustee will support the candidate collaborating companies and advise them on possible opportunities and risks. Once the neutral trustee identifies a number of bilateral or multilateral horizontal collaboration opportunities (transport matches), NexTrust follows a multi-step process of qualifying and ranking them, before calculating in a structured way the business case for each opportunity. This will often be a dynamic, iterative process, requiring increasing levels of detailed case information and commitment from the candidate partners. These parties do not, as in the initial phase, only include the shippers, but also the LSP's. The shippers communicate a list of acceptable LSP's with the trustee(s). The trustee will then create a mutually acceptable list of carriers and start the tender process on behalf of the shippers.

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A constructive dialogue between shippers and carriers/LSP's during this preparation stage is therefore critical, in order to test and validate whether the theoretically assumed synergy savings can indeed be realized in practice, given the market conditions and constraints for the collaborating parties. This interaction will also be typically facilitated by the neutral trustee and can be supported by ICT tools.

Once the participants have agreed to collaborate on a specific lane, lane group or bundle, and have selected mutually acceptable carriers, they will:

- each contact the carriers directly, advise them on the collaboration opportunity and respectively ask them for a quote to be communicated to the trustee directly; and
- inform the carriers that the trustee will be acting on behalf of the joint participants; and
- ask the carriers to subsequently communicate directly to the trustee their quotes for the collaboration and on any other matters related to pricing.

During the meeting or afterwards, parties also need to have an outlook on the next step of the operation. For that reason the (content of the) contracts the parties will need to conclude in the operational phase have to be discussed already during the preparation phase.

The trustee will also collect all pricing information in respect of the business case. Assuming that prices are acceptable, the trustee will communicate to each participant separately their own new, proposed lane costs. The new and original costs that will be charged to the other participant(s) will not be communicated. The original joint costs (used to create the baseline) and the proposed new joint costs will also not be shared. Again, the trustee functions as a black box.

Once the participants have individually agreed to the new costs negotiated by the trustees, they can individually engage in facilitated discussions with the nominated carrier on specific issues related to the transport of their goods, including service requirements. The nominated carrier will be bound to an obligation to keep business sensitive information of the other participants confidential, in order to avoid the risk of indirect exchange.

The information in respect of individual lane specific costs is provided to the trustee for the express purpose of identifying joint baseline cost for a round trip or bundling in conjunction with the development of a business case for a specific pilot case. This information, along with the new carrier offers that may be solicited as part of the business case development process, is a key element in determining a no-go or go-ahead. In a joint go/no-go decision, the parties decide whether further expansion of the project is worthwhile.

3. Legal aspects and remarks phases 1 and 2

3.1 General

As we have stated before, the first two phases are not purely initial/pre-contractual phases. In the initial phase, each shipper enters into a service contract with the trustee and all the shippers and the trustee sign a NDA with data rules and confidentiality, both in the initial and in the pre-contractual phase. In view of these facts, this phase is rather a contractual phase or a hybrid phase between pre-contract and contract, especially as far as the relationship between the shippers and

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the trustee is concerned. Obviously the shippers are not forced in the very beginning to actually bundle freight flows due to the uncertainties of a positive outcome of a matching collaborative business case. However, the shippers (and the trustee) are bound to strict confidentiality. Furthermore, although parties have entered into several agreements, it is not clear upfront if and when the activities carried out by the trustee will have a positive outcome. That is why clear arrangements in the very beginning are so crucial. It is also crucial to coordinate the legal and commercial processes very well.

During the preparation phase, parties need to make choices for the contractual basis in the operation phase. Since logistics collaboration under NexTrust has horizontal and vertical aspects, it can only be covered by several multiparty agreements.

3.2 Confidentiality

Confidentiality is one of the keystones in collaboration projects and the development of such projects. In NexTrust, strict confidentiality is not only important in view of competition law risks and protection of sensitive information, but also serves a more general purpose of adequate communication and dissemination of information (correct, complete and well-timed) about the NexTrust project and its future results. Confidentiality of information and arrangements in respect of the data shall extend also to any resulting analysis output (e.g. ‘collaborative matches’) and subsequent forecasts. After matching and analysing the ‘high level transport data’ of two or more prospective participants, the trustee(s) shall only be allowed to share the results of the analysis process and present the potential business case with the prior written permission of the parties involved. To obtain such permission, the trustee(s) informs the parties individually that a collaborative match has been identified on the basis of the high level transport data. When subsequently permission is given, the results of the analysis process and potential business case can be represented to the parties involved. In doing so, all parties will need to ascertain that exchange of sensitive information between (actual or potential) competitors is avoided. Parties shall therefore appreciate their mutual (legal) interests and will make and lay down clear arrangements and procedures in advance, which could also include the calling in of a second independent, neutral service provider (for example an audit company), which, if so desired, could perform a check on / audit the activities of the trustee and the information flow from the trustee to the prospective participants.

3.3 Competition Law aspects in phases 1 and 2

The fact that participation is voluntary, however, does not mean that it is without obligations and responsibilities. NexTrust partners that are participating in a pilot case, are receiving funds for project tasks they may execute and are of course bound to the arrangements with the funding authority and other project partners. Furthermore, all participants have the obligation to comply with any applicable law and regulations, including (EU) competition law.

As an introductory note to this chapter, it should be understood that this chapter only gives an introduction to the basics of competition law that are relevant to the identification and preparation

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phases in NexTrust. In deliverable 6.3, we will zoom in on the competition law aspects of horizontal and vertical collaboration in the supply chain in more detail.

It is important to realize, that in principle competition law does not make a distinction between pre-contractual and contractual stages of a collaboration between parties. The distinction between non-contractual, pre-contractual and contractual stages is a typical civil contract law way of looking to the legal reality. In the context of competition law, the direct and indirect (via a third party) exchange of information between competitors is for example relevant, as the exchange of commercially sensitive information between actual or potential competitors is forbidden under the cartel prohibition. This prohibition applies irrespective of competitors negotiating a contract or having entered into a contractual relationship or having no contract at all. Competition law focuses both on the information flows between competitors and on the contractual relationships between them.

3.3.1 The importance of compliance with (EU) competition law

A fundamental question to be asked at the start of any collaboration is whether it is compliant with competition law, more in particular the cartel prohibition of article 101 paragraph 1 of the Treaty on the Functioning on the European Union (‘TFEU’) and its national equivalents. In addition to the undesirable economic effect of cartels, such as the impediment of competitive processes on the market that results in higher prices or less incentives to innovate, infringements of the cartel prohibition also have undesirable practical and legal consequences for cartel participants.

From a legal point of view, cartel agreements are void and unenforceable. Cartels may also lead to high fines by the European Commission (‘EC’) or national competition authorities (‘NCA’) for the undertakings and persons that are involved, and in some EU member states even to criminal sanctions. Cartel participants are also liable for the civil damages they caused by the infringement, which may result in civil claims, subsequent settlement negotiations and/or long and costly legal procedures.

Compliance, although nowadays high on the agendas of most large and medium-sized companies, is not always an easy task. Undertakings must assess themselves whether their collaboration is compliant with competition law. They can even be held liable for cartel behaviour of their partners. Therefore, it is important that collaborating undertakings agree to work within a (legal) framework that ensures everyone’s compliance with competition law.

3.3.2 The basic structure of competition law

The assessment of whether a certain form of collaboration is compliant with competition law often entails both a legal and economic exercise. The cartel prohibition aims to protect not only the interests of competitors or of consumers, but also the structure of the market and, in doing so, competition as such.[8] The essence of the cartel prohibition is that collaboration between

[8] ECJ 6 October 2009, C-501/06 P (GlaxoSmithKline) par. 63, ECJ 4 June 2009, C-8/08 (T-Mobile) par. 38.

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undertakings is allowed, unless it has the object or an appreciable effect to prevent, restrict or distort or otherwise impair full and fair competition.

In some cases, the economic benefits of a collaboration outweigh the restrictive effects on competition and can be exempted from the cartel prohibition. To qualify for such an exemption four conditions must be met, namely the collaboration must contribute to economic efficiency gains, consumers must be allowed a fair share of the benefits, the restriction of competition must be indispensable to achieve the efficiency gains and the collaboration may not eliminate the competition entirely (article 101 paragraph 3 TFEU and national equivalents). Undertakings must themselves assess whether an exemption applies on a specific collaboration. Should a competition authority object against a collaboration, than it is important that the collaborating undertakings are able to demonstrate the fulfilment of the four conditions.

Some groups of collaborations, such as certain transport, specialisation and R&D-agreements and vertical agreements, are considered to be economically efficient in itself. Such collaborations are therefore exempted from the cartel prohibition by EC Block Exemption Regulations ('BER'). These BER or 'safe havens' lay down specific legal criteria in order to benefit from the exemption. These safe havens contribute to legal certainty and facilitate compliance. However, the compliance with these criteria (such as maximum market shares) should be monitored by the undertakings during the collaboration in order to prevent that a collaboration, that initially is economically efficient, derails into a cartel. It is a dynamic assessment and therefore, a BER may apply to a collaboration in the beginning but no longer after a certain period.

3.3.3 Forms of collaboration that should be avoided at all times: object restrictions

The scope of the cartel prohibition does not only cover written contracts. It is drafted to cover all forms of coordination or collaboration between undertakings, such as gentlemen agreements, oral agreements, concerted practices and decisions by associations of undertakings. All different phases of a proposed collaboration and all kinds of contacts are relevant. Therefore, undertakings should at all times be cautious to avoid cartel arrangements, also in the identification and or preparation phases, even when these phases do not result in a signed contract.

That is because certain types of agreements can be regarded, by their very nature, as being injurious to the proper functioning of normal competition and reveal in itself a sufficient degree of harm to competition. They are the so-called 'restrictions by object'.

According to standard European case law, it is not necessary to demonstrate that an object restriction produces adverse effects in order to establish an infringement of the cartel prohibition.[9]

Furthermore, it is sufficient that the agreement has the potential to have a negative impact on competition. Whether and to what extent that negative impact actually takes place is only relevant for determining the amount of a fine or to establish civil liability.[10] From the perspective of

[9] ECJ 16 June 1965, joined cases C-56/64, C-58/64 (Consten and Grundig), ECJ 20 November 2008, C-209/07 (BIDS) par. 15/16, ECJ 6 October 2009 and C-501/06 P (GlaxoSmithKline) par. 55.
[10] ECJ 4 June 2009, C-8/08 (T-Mobile) par. 28-31.

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competition authorities it is a straightforward task to prove an infringement in the event a collaboration qualifies as an object restriction.

Moreover, object restrictions are explicitly excluded from the scope of BER and it is also assumed that object restrictions are not exempted by the individual exemption of article 101 paragraph 3 TFEU (and the national equivalents). Chances of success for undertakings to invoke that an object restriction should nevertheless be exempted from the cartel prohibition are nil.

The object restrictions that can be identified and therefore should be avoided are, with respect to collaboration between undertakings that are (potential) competitors (horizontal cooperation, for example between shippers), all forms of agreements:

- to fix prices;
- to exchange (commercially sensitive) information that reduces uncertainty about future market behaviour;
- to share markets or customers;
- to limit output or sales;
- collective exclusive dealing;
- to pay competitors to delay entry of competing products.

With respect to collaboration between undertakings that are not competitors (vertical cooperation, for example between shippers and LSP's, or shippers and resellers), undertakings should avoid agreements:

- to impose fixed or minimum resale prices;
- to impose (specific) export bans; and
- specific distribution agreements.

3.3.4 The exchange of commercially sensitive information

Especially the first two steps of the NexTrust three step methodology, where undertakings are seeking or identifying potential business opportunities and prepare specific business cases, are circumstances in which information such as volumes, transport costs, terms of supply, etc. ('high level transport data') has to be gathered, analysed and negotiated. Therefore, undertakings have to exchange information up to a certain level in order to be able to collaborate and achieve economic efficiencies. In doing so, the undertakings – especially when they are (potential) competitors - should be cautious not to infringe the cartel prohibition along the way. It is vital that undertakings are aware which information they are or are not allowed to share, and with whom.

According to European case law, information exchanges that are private rather than public and designed to remove uncertainties concerning the intended market conduct of undertakings and facilitating, directly or indirectly, cartel arrangements such as price fixing, market sharing or limiting sales, fall within the category of object restrictions.[11]

[11] ECJ 4 June 2009, C-8/08 (T-Mobile) par. 41-43.

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That is because, according the principles of competition, each undertaking must determine the (commercial) policy which it intends to adopt independently. This requirement of independence does not deprive undertakings to adapt themselves intelligently to the existing or anticipated conduct of competitors. However, it strictly precludes any direct or indirect contact by which an undertaking may influence the conduct on the market of its actual or potential competitors or disclose to them its decisions or intentions concerning its own conduct on the market, where the object or effect of such contact is to replace the normal conditions of competition by collusion. In order to define the normal conditions on the market, regard must be had to the nature of the products or services offered, the size and number of the undertakings involved and the volume of that market.

Exchanges of information are therefore liable to be incompatible with competition law if they reduce or remove the degree of uncertainty on the market.

It is a legal presumption that when an undertaking took part in an information exchange and remained active on the market, that undertaking will take the exchanged information into account in determining its market conduct. Such exchanges are caught by the cartel prohibition, even in the absence of anticompetitive effects on the market.[12] Information that is suitable to reduce or remove uncertainty of future market behaviour and facilitate cartel arrangements instead, could (for example and not exclusively) include:

- information related to prices, costs, margins and discounts;
- payment terms;
- production volumes or capacity;
- terms of supply and trade;
- purchasing strategies;
- product or business plans;
- information regarding suppliers or customers (e.g. whether an offer will be submitted);
- market shares;
- purchase and sales in volume or value.

In deliverable 6.3, we will elaborate on the specific characteristics of the commercially sensitive nature of the information and how to neutralise that nature of the information.

3.3.5 Indirect information exchanges via third parties: ‘hub and spoke’ and ‘cartel facilitators’

Not only the direct but also the indirect exchange of commercially sensitive information via a third party, for example via a common supplier, customer or an independent service provider, is considered as an exchange caught by the cartel prohibition. This is referred to as a ‘hub and spoke’ exchange or cartel, where the third party acts as a hub between the collaborating undertakings, the spokes. The collaborating undertakings can be held liable for cartel arrangements on account of the acts of an independent service provider, if:

[12] ECJ 19 March 2015, C-286/13 P (Bananas) par. 111-127.

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- the service provider was in fact acting under the direction or control of the undertaking (for example via ownership, shares, rights to appoint directors, etc.); or
- the undertaking was aware of the anti-competitive objectives pursued by its competitors and the service provider and intended to contribute to them by its own conduct (for example by explicit or tacit consent); or
- the undertaking could reasonably have foreseen the anti-competitive acts of its competitors and the service provider was prepared to accept the risk which they entailed.[13]

Furthermore, if the third party intended to contribute by its own conduct to the cartel arrangements or objectives between the collaborating undertakings and that it was aware of the actual conduct planned or put into effect by that undertaking in pursuit of the same objectives or that it could reasonably have foreseen it and that it was prepared to take the risk, that third party will be considered as a ‘cartel facilitator’ and can be held liable for the cartel in addition to the other cartel participants.[14]

In deliverable 6.3, we will elaborate more on ‘hub and spoke’ cartels and ‘cartel facilitators’ and how to take measures to avoid such situations.

3.3.6 The NexTrust framework to collaborate in a compliant way

As described in paragraphs 3.3.4 and 3.3.5 undertakings are not allowed to (directly or indirectly) share commercially sensitive information or make any other cartel arrangements. There is a considerable risk of infringing the cartel prohibition if undertakings share too much information or share information in an improper fashion. In order to neutralise this risk, NexTrust develops a framework which enables undertakings to collaborate in a compliant way.

The use of a solid and standardized legal framework is strongly recommended in order to provide legal certainty and clarity. The use of such a framework will also facilitate the smooth working of a collaborative community, as it provides a written record of arrangements such as NDA agreements. The most important aspect of the framework from a competition law point of view is that the undertakings collaborate via an independent trustee. This trustee serves as ‘black box’ and creates ‘Chinese walls’ between (the information flows from) the participating undertakings. All undertakings are bound to confidentiality. In this way, the undertakings can collaborate without sharing commercially sensitive information.

In phase 1, this means that a trustee will recruit potential participants. If an undertaking is interested to collaborate in order to achieve efficiency gains in its logistics, that potential participant will provide ‘high level transport data’ to the trustee on an individual basis, so without sharing this information with other undertakings beforehand. The trustee undertakes to and guarantees that the information will not be exchanged with any other party. The trustee will then analyse the ‘high level transport data’ in order to identify business opportunities. The before is further described in chapter 2.

[13] ECJ 21 July 2016, C-542/14 (VM Remonts) par. 33.
[14] ECJ 22 Ocotober 2015, C-194/14 P (AC Treuhand) par. 30.

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In phase 2, the trustee will disseminate to all (potential) participants which business opportunities it has found and which next steps are required to benefit from them. However, this feedback should not contain any commercially sensitive information regarding other or all participants. The trustee should only give information to participants that is sufficiently aggregated and anonymised, in such a way that it is no longer possible to identify any information regarding individual participants which would be suitable - if shared with one or more (potential) competitors - to reduce the degree of uncertainty concerning intended market conduct. This should be the rule of thumb during all plenary meetings. Also, on a one-on-one basis in contacts between the trustee and individual participants, they are only allowed to exchange information that relates to that specific participant.

In short, a number of guidelines are being promoted to avoid antitrust risk, for example:

- Avoid sharing commercially sensitive information directly or indirectly (through a so called “hub and spoke”) between the parties;
- For internal meetings: confidentiality and anti-trust or competition law caution. For external meetings: anti-trust or competition law caution;
- Use a neutral trustee or intermediary as information “black box” or “Chinese wall”;
- Use a pre-approved multi-party agreement or template according to jurisdiction;
- Make the collaboration transparent (in principle) and open for new entrants;
- Clearly define what is in and out of scope (e.g. trade lanes);
- Calculate and demonstrate the efficiency gains;

Concentrating on the competition law safeguards in the preliminary stages:

- Phase 1: one way information flows from the individual shippers to the trustee in order to find matches in logistics;
- Phase 2: the trustee gives aggregated and/or anonymised feedback to shippers that ‘matches’ are found.

For the above reasons it is important to implement the early negotiations between the parties during the initial and the preparation phase, including an anti-trust or competition law caution, confidentiality rule, data rules and instruction for the trustee in an NDA. The trustee(s) has the role of a compliance officer and will take responsibility for the legal foundations of the collaboration, making sure that for example the necessary contracts are in place, that the collaboration complies with competition law and that the shared data remain strictly confidential. Entering into an NDA, including rules with respect to (exchange of) data, is a strict requirement to participation in NexTrust pilot cases.

3.4 IT / IP-law aspects in phases 1 and 2

The NexTrust project is powered by data and data analysis. Information equals data and all project data will need to be stored, processed and communicated. NexTrust is using a neutral ICT platform to match freight flows and trade lanes of different supply chain actors. This means also that in every set up of a pilot case intellectual property law, law on databases and privacy laws will play a

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vital role. As it may be impossible to disentangle (or remove) information, every pilot case should be aware, as of the moment the first meetings, that binding agreements should be closed on these subjects at an earliest stage as possible.

Some Intellectual Property rights are created by operation of law. If parties collaborate in development, questions may arise on ownership of data, databases and other intellectual property rights. It is also necessary to pay attention to secure data transfer. To prevent legal discussions, decisions on these subjects need to be taken upfront and informed and arrangements will be put down in writing before data is exchanged (in any form whatsoever).

In the pre-contractual phase a match should be identified. Collaboration in the supply chain comes with the setting up of matchmaking services. Companies that run a databank to which individual shippers provide supply chain data in view of comparison with the data of other shippers in order to identify bundling opportunities. In the initial (and preparation) phase, a complexity of legal issues in relation to data comes up, like confidentiality, data security, data ownership, database rights, copyrights etc.

3.4.1 *What is data?*

The first step in this process is to define the data. As mentioned there are different types of data. There is private data, public data, export data, transport data, capacity data, knowledge, personal data. To become aware of all this data, it is important for companies involved in the process to define the information in the logistic process.

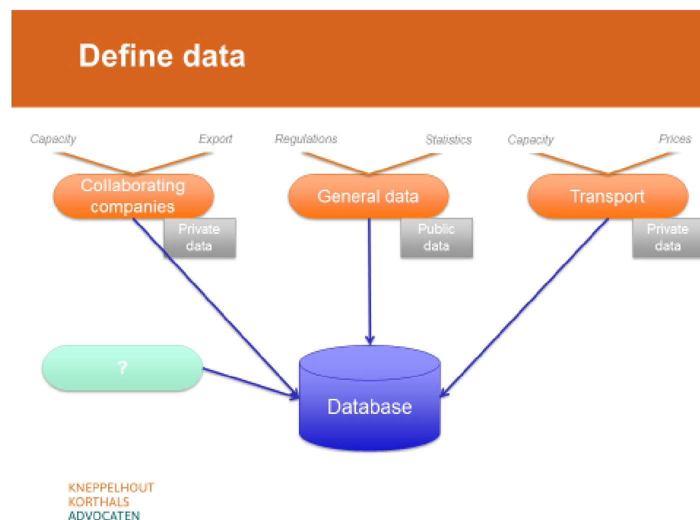

Figure 3: Define data

3.4.2 *Legal scope*

Like the different types of data are involved, the legal scope in relation to the data is very divers and broad. The value of data and databases is increasing and therefor the laws which enable data

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to be protected and exploited are crucial. Database rights can be a valuable commercial asset and generally time and money is invested in their creation and maintenance.

The law protects this investment in two ways, on a country level and EU level. We will discuss the different legal aspects and legislation in relation to the data from both an EU and Dutch perspective. The legislation in relation to data has to be differentiated between the IP rights in data and databases and the data protection. As database law is only partially harmonized in the EU, both the EU law as the Dutch legislation will be covered. Besides the differences in legislation we also have to differentiate the different kind of databases. In this report we will discuss (i) the original database, (ii) the database in which an investment has been made and (iii) confidential databases.

3.4.2.1 IPR and databases – EU law

I. Original database

Databases are protected by copyright as a database. Under the EU Database Directive 96/9, a database is defined as a collection of independent works, data or materials arranged in a systematic or methodical way and individually accessible by electronic or other means. The protection of the copyright is given to the author or the creator of the database. A database must satisfy the aforementioned definition and "constitute the author's own intellectual creation" by reason of the "selection or arrangement" of the database's content. The author's own intellectual creation requirement has been expressed as the author expressing his creative ability in an original manner by making free and creative choices" together with a personal touch. There is no requirement for copyright in the database to be registered.

Protection in the database applies automatically once the database exists in material form and will last for 70 years after the end of the calendar year in which the author died. Infringement will arise by temporarily or permanently reproducing the database, translating, adapting or altering the database or distribution or communication to the public of copies of it without the permission of the owner. EU remedies include injunctions and the recall or destruction of infringing materials or materials used to create infringing copies, damages and payment of legal costs.[15]

II. Database in which an investment has been made

Databases that involve investment are also protected as the definition of database under the Database Directive is the same as for copyright. The maker of the database (the person who takes the initiative and the risk of investing) is protected, however if the work is subcontracted, the commissioner of the sub-contract will be the copyright owner (see Database Directive recital 41). Investment in obtaining must not have been in the creation of the data which are subject of the database, but rather seeking out existing independent materials and collecting them in the database. The right arises on the creation of the database and lasts 15 years from its creation or (if later) being made available to the public. A new 15 year period right is commenced when substantial updates or changes are made to the database. The database right can prevent the extraction or reutilization of the whole or a substantial part of the contents

[15] EU IP Enforcement Directive 2004/48.

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of the database and repeated and systematic extraction or reutilization of insubstantial parts of the contents of the database. The remedies for infringements are broadly the same as for copyrights (see under I.)

III. Confidential databases

In May 2016 the EU Council adopted the EU Trade Secrets Directive. This Directive provides for a common framework of minimum standards that Member States must provide for the protection of trade secrets. The Directive aims to harmonize the definition of "trade secret" in the EU and to offer appropriate means of action and remedies against unlawful acquisition, use and disclosure of confidential commercial information, such as provisional and precautionary measures, injunction and correctives measures or allocation of damages, while ensuring freedom of expression and information as well as protection for whistleblowers.

The Directive also sets up rules to ensure protection of trade secrets, both during and after legal proceedings, including the possibility for judicial authorities to take specific measures (for example restricting access to documents containing trade secrets or to hearings when trade secrets may be disclosed). With this new Directive databases confidential information can also receive protection. Before this Directive there was no EU law protecting confidential information.

3.4.2.2 IPR and databases – Dutch law

I. Original database

Under Dutch law, original databases are protected under article 10 (3) of the Dutch Copyright Act. This is in conformity with the EU-wide Database Directive. Even prior to the enactment of the Directive, the Dutch Supreme Court requested similar copyright protection to databases, applying a test which is similar to the EU threshold requirement that the collection of the database constitutes an "intellectual creation of the author". Right holders of such original databases are entitled to the usual remedies against copyright infringement, warranting both injunctive and monetary relief.

II. Databases in which an investment has been made

In the Netherlands, protection is provided in the so-called Databases Act (*Databankenwet)*, which implements the EU-wide Database Directive. The Netherlands has seen increased industry activity and also increased litigation in the field of database protection. Much attention has been paid to the so-called (in)admissibility of dedicated search engines re-utilizing data from information portals involving e.g. real estate and used cars.

III. Confidential databases

At this moment the Netherlands provides for protection of confidential databases, primarily on the basis of the general doctrine of tort (article 6:162 DCC) and the over-arching obligation in article 39 TRIPS to protect confidential information and trade secrets. From a case of 2011 it seemed that the confidential information itself is not protected. It is rather the unlawful violation of the obligation of confidentiality which constitutes the tort. This is often accepted in case of breach of contract, abuse of trust and inducements to violate confidentiality obligations. The

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protection of confidence may cover the confider of the database, but only in circumstances where the recipient of the information contained owes the confider an obligation to keep the information confidential. The information itself needs to be confidential in the sense that the information was not generally known and the proprietor of the confidential database took reasonable measures to safeguard such confidentiality. The protection arises from the time the obligation of confidence arises (providing the confidential data base) and lasts until the obligation ceases (usually until de information passes into the public domain).

As mentioned above the EU Trade Secrets Directive has been adopted which means that the Dutch legislator has to implement this Directive into the Dutch legislation during the next 2 years.

3.4.2.3 Privacy law and databases – EU law

Handling personal data is currently subject to the EU Data Protection Directive 95/46, which has been implemented by national legislation across the EU. However, this Data Protection Directive will be replaced by the General Data Protection Regulation ("**GDPR**"). This new Regulation will be directly applicable in all Member States without the need for implementing national legislation. It will not apply until 25 May 2018.

Personal data is a wide definition which includes any information relating to an identified or identifiable natural person. It can include contact information such as home addresses, email addresses, telephone numbers, financial information and health information. In general individuals who are the subject of the personal data are protected by the Directive and the GDPR. Data subjects have various rights, including the right to be informed when their data is being processed. The legislation regulates the processing of personal information, mainly through imposing obligations on data controllers. The new GDRP imposed much more extensive obligations on data controllers than the current Directive. This can limit what the owner of a database can legitimately do with that database.

3.4.2.4 Privacy law and databases – Dutch law

The Netherlands implemented the EU Data Protection Directive 95/46 EC on 1 September 2001 with the Dutch Personal Data Protection Act (*Wbp*). Enforcement is through the Dutch Data Protection Authority (*Autoriteit Persoonsgegevens*). As mentioned above the GDPR will apply also in the Netherlands as from 25 May 2018.

3.4.3 Confidentiality

As already mentioned, confidentiality is very important. However, to guarantee the confidentiality of the data and database all parties that are involved should know their responsibilities across all sectors and in all stages of collaborations. Furthermore, all parties should agree on the confidentiality and disclosure should be done properly. The foregoing could be enforced by obliging parties to enter into NDA's. Besides NDA's all agreements should include a clause with respect to confidentiality.

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3.4.4 Security

Another important aspect is the security. To avoid any data breaches parties should take sufficient technical measurements to protect the databases. These technical measurements are also one of the requirements according to the Dutch Data Protection Act.

3.5 Legal aspects negotiations operation phase

During the preparation phase parties also need to discuss the contractual basis for their collaboration. The mutual rights and obligations of the shippers, intermediaries and LSP('s) need to be addressed in multiparty agreements. Horizontal collaboration is innovative and touches upon many areas of law, such as general contract law, competition law, IT-law and (international) transport law. Last but not least, aspects of international private law need to be taken into account, as transport lanes in most cases will cross borders and often parties form different countries will be involved. Although the last-named area of law for an important part exists of international conventions and is used to deal with complex international contractual relationships, one needs to realize that transport law has its particularities, such as mandatory (international and national) law, separate regimes for different modalities and multimodal transports, a very formal character as regards the title to claim, a result obligation, short time bars, liability limitations and strict rules with respect to jurisdiction. The contractual freedom is limited; the international and national legal framework needs to be observed. Developing a legal framework thus demands a multi-disciplinary approach. Written contracts can facilitate and guarantee a smooth working of the collaboration between the shippers by identifying and clearing away potential (legal) obstacles and providing quick and clear solutions to remaining problems. Legal contracts can provide legal certainty and also legal uniformity. The structure of the legal framework, which has to be discussed during the preparation phase, includes three contractual levels.

3.5.1 Collaboration contract between the shippers

First there is a multiparty agreement between the shippers. In order to manage the collaboration between the shippers, but also to reduce the competition law risks of (in)direct information exchange between competitors, it was decided that a neutral trustee needed to enter the game. The mutual shippers willing to participate in a horizontal collaboration – for example – at least need to think of 'entry and exit' and 'gain sharing' rules as well as have to decide whether they want to enter into the collaboration 'without any obligations' or – to the contrary – want to commit to minimum volumes over a certain period of time. In a nutshell important aspects which need to be discussed are:

- form of the collaboration: a point of special interest is the legal form of the collaboration. In our view the collaboration has a contractual nature only. The prospective participants of a horizontal collaboration (project) simply want to pool their cargo. That does not mean they (have the intention to) enter into a joint venture or some kind of contractual partnership agreement. That will explicitly not be their intention;
- the object of the collaboration;

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- gain sharing mechanism: a fair gain sharing mechanism is essential for the success of the collaboration. This gain sharing mechanism has to be included in the contract and has to be discussed during the preparation phase;
- rules with respect to volume variation: parties have negotiated price reductions with LSP's via the trustee in advance on the basis of freight volumes. This might lead to problems when the parties fail to live up their promised volumes. A similar situation can for example occur when the choice for a certain transport modality depends on the combined promised freight volumes;
- entry/exit clauses: from a competition law point of view it can be important to keep the collaboration open and transparent. On the other hand, parties need to have the commitment to build long term relationships. Otherwise it will not work;
- competition law;
- liability regime;
- *choice of law (see section 3.5.4);*
- *jurisdiction (see section 3.5.4).*

3.5.2 Agreement between the shippers and the trustee

Again, this agreement is a multiparty agreement. All shippers are party to this agreement on an individual basis since the collaboration between the mutual shippers normally has an obligatory nature only. The shippers do not set up a separate company. The contractual relationship between the shippers and the trustee already starts in the initial phase, because the shippers have to make arrangements with the trustee. The tasks and services of a trustee need to be identified and the contracting parties have to determine how confidentiality and the security of data will be guaranteed. In a nutshell important aspects which need to be discussed/included in this contract are:

- reference to the initial contract between shippers and trustee;
- list of tasks / activities, working method: the tasks can be divided into 'offline' and 'online' tasks. The offline activities more or less create a new function in the logistics chain. The online activities relate to the harmonization of the daily processes and have therefore a more traditional character (comparable to freight forwarding);
- define the typical gain sharing task of the trustee. Given the gain sharing mechanism tackles the financial flows between multiple shippers and each shipper's info needs to be hidden from the other shippers, typically the trustee will arrange the actual gain sharing set-up and info flow.
- confidentiality clause;
- data rules, data ownership, privacy issues;
- trustee compensation;
- freight forwarding / position trustee towards LSP's (see above). From a transport law point of view it is important to know whether the contract between the shippers and the trustee qualifies as an agency agreement in general, or – as a consequence of the online activities carried out by the trustee – (also) as forwarding contract. After all, that could have consequences for the legal regime that applies to this contract, especially under national

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legal systems which provide for specific statutory provisions for particular types of contracts. Dutch law for example provides for a specific regulation of the forwarding contract (as well as by the way the commission contract and the mandate contract);
- liability regime;
- *choice of law clause (see section 3.5.4);*
- *jurisdiction (see section 3.5.4).*

3.5.3 Carriage contacts between shippers and carrier

In this carriage contract the shippers and the LSP(‘s) have to record that freight will be moved against the background of the broader collaboration between the shippers. Depending on the type(s) of goods to be carried, special requirements with respect to (un)loading, stowage and transport have to be laid down in this framework contract in order to avoid cross-contamination and other risks that might occur and to allocate reciprocal responsibilities of the shippers and LSP(‘s). From a transport law point of view the actual carriage contracts need to be concluded in a direct contractual relationship between the individual shippers and the individual LSP’s. It is - for example - not the intention that the goods of the one shipper are mentioned on a CMR-waybill together with the goods of another shipper. If that would be the case, this could lead to procedural complications in case of transport damages. Therefore, although the cargo is bundled during transport, there need to be just as many carriage contracts as there are shippers involved in the collaboration.

The absence of an international treaty with respect to multimodal carriage contracts seems to be a legal obstacle for horizontal collaboration in the supply chain. This typical aspect will be discussed in Deliverable 6.5. Thus, before signing this framework carriage contract in the operation phase the following aspects need to be discussed in the preparation phase:

- acknowledgement of special character collaboration shippers: the LSP’s which will be involved, to a certain extent need to acknowledge the special character and vulnerability of the collaboration between the shippers. Think for example of the exercise of rights of retention with respect to the goods of one shipper on a container in which the goods of another shipper are stowed as well. Situations like that can happen in practice and would in case of collaboration not only lead to tensions between the LSP and the shippers, but could also easily restrain the relationships between the shippers between or among themselves;
- position trustee;
- service levels;

3.5.4 International private law

During the preparation phase parties also need to discuss under which law and jurisdiction they want to collaborate. The legal framework consists of three model framework agreements. In many cases parties from different countries will be involved and the nationalities of these parties can differ per contract. Since the agreements are connected, it is important to analyse the implications of international private law and ideally coordinate the national law which applies (additionally) to the different contracts. The same goes for the international jurisdiction. Preferably, the national court which has competence with respect to possible disputes should be able to apply its own

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national law. In general coordination of the applicable national and law and jurisdiction will benefit to the predictability and quality of court decisions.

With respect to the “applicable law” Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (‘Rome I’) provides for the relevant rules. Article 3 states first and foremost that parties have freedom of choice with respect to the national civil law they want to apply to the contract. This choice shall be made expressly or clearly demonstrated by the contract. We advise to enter a choice of law clause in the contracts. Otherwise, parties might end up in complicated discussions about the applicable law. With respect to the collaboration agreement article 4 of Rome I *‘Applicable law in absence of choice’* does not contain a clear criterion to determine the applicable law. Without a choice of law clause, the agreement will be governed *“by the law of the country with which it is most closely connected”* (article 4, paragraph 4). After all, between the shippers there is no ‘characteristic performer’. By absence of a choice of law clause, the contract with the trustee will be governed by the law of the court where this service provider has his habitual residence (article 4, paragraph 1, sub b Rome I). In our view it is undesirable that this is another law than the law which applies to the collaboration agreement between the shippers. After all, both agreements are closely connected to one another.

Carriage contracts with LSP’s will in most cases be governed by mandatory applicable international conventions such as for example the CMR (road), CMNI (inland waterways) or the COTIF-CIM (railway). However, in addition to that it is possible to appoint a national legal system that applies additionally to the applicable international convention and governs legal issues which have not been provided for in that convention. Apart from that it is also possible – and advisable - to make a choice of law clause in the framework carriage contract in view of multimodal transports.

In accordance with article 23 of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (‘Brussels I’) the contracting parties are also allowed to allocate (international) jurisdiction to a national court of their choice. Since such jurisdiction choice should be made in writing parties have to include it in their contract. With respect to the framework carriage contract, parties also need to take into account the strict rules with respect jurisdiction clauses included in the international carriage conventions.

4. Conclusion

The first two phases, identification and preparation, of a possible collaboration are crucial. They form the basis of de final operation phase. General contract, competition law and IT/IP-law aspects have been analysed. It is a natural consequence that IT/IP-law plays an important role in the identification and preparation stages of logistics collaboration projects. After all, IT makes it possible to collect, analyse and compare the logistics data of different market players and has therefore cleared the way for innovation and collaboration.

The *identification* phase is the stage of data collection and matchmaking. It precedes the (pre-contractual) phase in which a match is identified and the business case is developed. Collaboration in the supply chain comes with the setting up of a matchmaking service. Therefore individual

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shippers provide supply chain data to trustee companies that run a data platform in view of the comparison of this data with the data of other shippers which do the same in order to find bundling opportunities. In this stage a variety of legal issues comes up, such as confidentiality, data security, data ownership, prevention of misuse and the competition law risk of (in)direct information exchange. The identification phase is an individual stage; shippers interact with the trustee on a one-to-one basis.

The *preparation* phase is the succeeding, collective pre-contractual stage which covers the period after a match is identified to the moment (operational) contracts have been entered into between the shippers and logistics service providers. In this stage the trustee has introduced the shippers involved and they will work out their business case together under the management of the trustee who does not only give direction to the business case development process but who can also assure that the shippers involved in the proposed collaboration, can avoid the exchange of commercial sensitive information. There is no need for that as the trustee can and will act as black box. Relevant legal issues are again confidentiality of data, competition law risks, the break-off of negotiations, mutual liability and the tender process to select a logistics service provider. In this Deliverable a detailed analysis has made of the legal issues that come up for discussion in the preparation stage as well.

Successful collaboration is not a matter of luck. It is the result of a structured process from the very beginning. Therefore, the central proverb is: "*A good beginning is half the battle".* Apart from that, it is obvious that 'trust' between the players involved is essential to success. The trustee plays an important role to support the trust between the parties and so does proper legal process management. A key lesson for prospective collaboration partners is to pay attention to the legal issues that need to be addressed in the first two stages in time. That way, the participants manage their expectations; they have a clear process and arrangements in place to regulate the preliminary stages in which they anticipate their collaboration project. In a sense, some basic principles and rules can avoid discussions that could easily hinder progress and even risk the end result. In these preliminary stages, the participants have not yet a cooperation contract in place. However they are working towards the operational stage of their proposed collaboration project and need arrangements regulating the identification and preparation stage of that project, such as NDA's and other mutual agreements. The Trustee could have under market conditions a "contractual" agreement with the participants by offering its matchmaking service. However, as the trustee role is new in the supply chain market and this role is funded by the EU project, the current set up of NexTrust pilot cases do not have a contractual agreement in place.

It is important to realize, that in principle competition law does not make a distinction between pre-contractual and contractual stages of a collaboration between parties. The distinction between non-contractual, pre-contractual and contractual stages is a typical civil contract law way of looking to the legal reality. In the context of competition law, the direct and indirect (via a third party) exchange of information between competitors is for example relevant, as the exchange of commercially sensitive information between actual or potential competitors is forbidden under the cartel prohibition. This prohibition applies irrespective of competitors negotiating a contract or having entered into a contractual relationship or having no contract at all. Competition law focuses

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both on the information flows between competitors and on the contractual relationships between them.

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Acronyms and Abbreviations

ACROYNM	EXPLANATION
DCC	Dutch Civil Code
EC	European Commission
FTL	Full Truck Load
GHG	Greenhouse gas
HR	Hoge Raad
ICT	Information and Communications Technology
KKL	Kneppelhout & Korthals
LOI	Letter of Intent
LSP	Logistics Service Provider
LTL	Less Than Truckload
NDA	Non-Disclosure agreement
PU (Dissemination level)	Public
R (deliverable type)	Document, Report
TEU	Twenty Foot Equivalent Unit
WP	Work Package

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